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SUPREME COURT OF THE UNITED STATES

No._____

THE CORTEZ COMPANY,

Petitioner,

vs.

COUNTY OF MANATEE, et. al

Petition for Writ of Certiorari

To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States:

Your Petitioner, The Cortez Company, respectfully prays this court for the issuance of a writ of certiorari to the Supreme Court of the State of Florida to review the decision and judgment of said Supreme Court of the State of Florida in the above entitled cause, dated January 17, 1964, and which became final upon that Court's denial of Petitioner's petition for rehearing on February 13, 1964, and the issuance of the mandate of said court on that date directed to the Circuit Court of Manatee County, Florida, affirming the decision of said lower court.

Reports of the Opinions Delivered by Lower Courts

1. Opinion of the Supreme Court of Florida affirming order of Circuit Court dismissing the Petitioner's complaint, not yet reported, was announced January 17, 1964. Mandate issued February 13, 1964, a copy of said opinion appears in the appendix hereto.

2. Order of the Supreme Court of Florida denying Petition for Rehearing was filed February 13, 1964. A copy of said order appears in the appendix hereto.

Basis of Jurisdiction

Petitioner seeks to have reviewed that order entered by the Supreme Court of the State of Florida in the above entitled cause, dated January 17, 1964, which became final upon a denial of Petitioner's petition for rehearing dated February 13, 1964, and the issuance of the mandate of said court on that date.

The jurisdiction of this court is invoked under the provisions of the following Statute of the United States: FCA, Title 28, Section 1257(3)

Section 1257(3) supra:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows. . . .(3) By writ of certiorari where the validity of a treaty or statute of the Uniited States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity, is specially set up or

claimed under the Constitution, treatiess or statutes of, or commission held or authority exercised under, the United States.

Questions Presented for Review

1. Is Section 253.122 of the 1957 Florida Statutes void and unconstitutional in that it impairs the obligations of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

2. Is the decision fixing such a bulkhead line void and unconstituonal in that it impairs the obligation of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

3. Is the decision fixing such a bulkhead line void and unconstitutional in that it is a taking of the private property outside the bulkhead line, without just compensation contrary to Amendment XIV of the Constitution of the United States?

Constitutional Provisions and Florida Statutes Involved

1. United States Constitution, Article 1, Section 10, Clause 1-FCA, Constitution, page 205.

2. United States Constitution, Amendment 14, - FCA, Amendments, Page 65.

3. Section 253.122, Florida Statutes, 1957.

4. Section 253.15, Florida Statutes, 1955.

5. Section 253.12, Florida Statutes, 1957.

Summary Statement of the Case

This application is based upon proceedings had in the Circuit and Supreme Courts of the State of Florida, upon motion to dismiss Petitioner's complaint.

On October 6, 1955, Petitioner entered into a contract with the trustees of the Internal Improvement Fund of the State of Florida, an agency authorized by statute to convey title to certain submerged lands in Florida, whereby Petitioner agreed to purchase and the said trustees agreed to sell approximately 75 acres of submerged lands in Manatee County, Florida.

There was in existance at that time Section 253.15 of the Florida Statutes which provided that in case submerged lands were sold by the Trustees pursuant to the above mentioned statutory law the purchaser had the right to fill in and set the bulkhead line for the land.

In 1957 Section 253.12 of the Florida Statutes was enacted, which conferred the right to ascertain and establish or alter bulkhead lines beyond which further filling operations or extensions were prohibited, upon the Board of County Commissioners of each county, subject to approval of the said Trustees of the Internal Improvement Fund.

On February 19, 1958, the said Trustees, pursuant to the abovementioned contract, conveyed a fee simple deed to approximately 75 acres of land in Manatee County, Florida, to the Petitioner.

On July 6, 1959, the Board of County Commissioners of Manatee County, Florida, established a bulkhead line across said lands and approximately 35 acres of said lands were thereby cut off from any type of filling operations.

Petitioner duly protested, without avail, to both the Board of County Commissioners and the Trustees of the Internal Improvement Fund.

On September 11, 1962, the Petitioner filed a Suit for Declaratory Decsree in the Circuit Court of the Twelfth Judicial Circuit for Manatee County, Florida, alleging, inter alia, that the action by the Board of County Commissioners in fixing the bulkhead line, as it related to petitioner's lands, impaired the obligation of petitioner's contract with the Trustee of the Internal Improvement Fund in violation of Article 1, Section 10 of the United States Constitution and constituted a taking of petitioner's property without due process of law in violation of the 14th amendment to the United States Constitution. It was further contended that Section 253.12 of the Florida Statutes was unconstitutional in that it impaired the obligation of the contract between petitioners and the Trustee of the Internal Improvement Fund.

Respondents filed motions to dismiss the said complaint for failure to state a cause of action and on the 25th day of February 1963 the Circuit Court ordered that the complaint be dismissed for this reason, and stated in part as follows:

> "That Section 253.122, Florida Statutes, is a valid and constitutional exercise of the legislative authority of the Legislature of the State of Florida, and that no rights lawfully vesting in the Plaintiff herein under the conveyances described in the Complaint have been infringed upon by the application of this legislation as set forth in this Complaint. This opinion and these findings are rendered in reliance upon the authority of the Supreme Court of the State of Florida in Deering vs. Martin (1928),

116 So. 55 and Gies vs. Fischer (1962), 146 So. 2d 361."

On the 5th day of April, 1963, petitioner filed its notice of appeal to the Florida Supreme Court and argued, both in its Appellant's Brief and on oral argument that its contractual rights had been impaired contrary to Article 1, Section 10, of the United States Constitution by virtue of the establishment of the said bulkhead line and that the establishment of the bulkhead line was a taking of petitioner's property without just compensation within the meaning of the 14th Amendment to the Constitution of the United States.

On January 17, 1964, the Florida Supreme Court entered an order affirming the Circuit Court Order stating that the case of *Gies v. Fischer*, Fla. 1962 146 So 2d *361*, disposed of the constitutional questions contrary to the appellant's contentions.

On the 30th day of January 1964, petitioner filed a petition for rehearing with the Florida Supreme Court. On the 13th day of February said petition for rehearing was denied by the Florida Supreme Court.

Petitioner now elects to pursue his remedy by petition for writ of certiorari to the Supreme Court of the United States.

Reasons Authorizing Writ

The contract entered into between the Petitioner herein and the Trustees of the Internal Improvement Fund was an Executory contract made in accordance with and pursuant to, the statutory law of Florida then in effect and was within the purview of Article 1, Section 10, of the United States Constitution which provides that,

"no state . . . shall pass any . . . law impairing the obligation of contracts." In *Farrington v. Tennessee*, 95 U.S. 679, 24 L.Ed. 558, this court held not only that the constitutional prohibition applies to executory contracts but also that the amount of the impairment is immaterial and "if there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of their Court to redeem the wrong."

Certainly, the valid laws subsisting at the time and place of making a contract enter into and become a part of the contract as if they were expressly referred to and incorporated therein; furthermore, Petitioner respectfully contends that particularly in a situation such as the instant case, where the parties have contracted upon a subject which is surrounded by statutory limitation and requirements, they are presumed to have entered into their agreement with referenc to such statutes, and the same enter into and become a part of the contract.

In the case of *Wood v. Lovett*, 313 U.S. 363, 85 L.Ed. 1404, this Court held that a state statute immunizing tax titles from attack because of certain irregularities and informalities in the proceedings prior to the tax sale created in one who purchased a tax title from the state while the statute was in force, a contract right which cannot be impaired by the subsequent repeal of the statute.

Appeal to this Court in the*Wood* case presented the question whether an Arkansas act repealing such a statute violated Article 1, Section 10, of the United States Constitution.

This Court, in reversing an Arkansas Supreme Court decision upholding a decree in favor of the of the Plain-

tiff in a suit to cancel the state's deeds of property acquired at a tax sale, stated as follows:

> "The Act of 1935, taken in connection with the other statutes regulating the acquirement by the State and the disposition by it of lands sold for delinquent taxes, constituted in effect an offer by the State to those who might become purchasers of such lands, and *the protection if afforded to the title acquired by such purchaser necessarily inured to every purchaser acting under it and constituted a contract with him* . . . But the appellants, as purchasers from the State, were given by the Act of 1935, an important assurance that the State would not itself take away, or authorize "others to destroy the estate which it had granted, by reason of technical defects in procedure cured by the Act of 1935.
>
> "It begs the question to say that the State may not abdicate its police power. In the exercise of the policy committed to the legislature it is competent for the State to enter into a contract which it intends as an assurance of protection to its grantee. This we think the State has plainly done in the present instance. The Judgment is reversed."
>
> (85 L.Ed. pages 140, 1408)

In the case at Bar the impairment of Petitioner's contract by the passage of F.S. 253.122, is both real and apparent. The State of Florida, through the Trustees of the Internal Improvement Fund, contracted to sell certain lands to Petitioners with the Petitioners to have the right to bulkhead, fill in, develop and improve same into extremely valuable lands.

The subsequent fixing of the bulkhead line (beyond which filling and developing operations were prohibited) by the Board of County Commissioners of Manatee

County, Florida, effectively drew a line across Petitioner's lands, rendering said lands completely useless.

The decision of this Court in the case of *Appleby v. New York*, 271 U.S. 365, 70 L.Ed. 92, considered and decided the very question presented by this petition.

The *Appleby* case involved a suit by the executors of one Charles E. Appleby who held deeds in fee simple from the City of New York made in 1853 and 1852,, one deed to their testator Appleby and one to Latou who later conveyed to Appleby. The land conveyed consisted of two water lots in the City of New York. The suit was brought in 1914, over sixty years after the conveyances, to restrain the defendant, the City of New York, and the lessees of the city's piers from dredging the land under water conveyed by the deeds and from using the water over the lots of the plaintiff's as slips and mooring places for vessels alongside those piers. A portion of these lands was filled.

In 1855, the legislature enacted into law an act, to establish for the harbor bulkhead and pier lines for the avowed reason that grants had been made and piers built which obstructed river navigation and the act made provision for a harbor improvement and also provided that it would be unlawful to fill in with earth-stone or other solid material in the waters of the port beyond the bulkhead line. In the same year, 1855, by virtue of the act, the Harbor Commission established a bulkhead line west of 12th Avenue. The Supreme Court said:

> "The necessary effect of this legislature and action, if made effective, was . . . to prevent the filling of plaintiff's lots outshore from the bulkhead line and the making of docks on the lots and the

enjoyment of wharfage at the ends thereof within 100 feet of the city's piers."

In 1871 another law was enacted relating to the government of the City of New York establishing the Department of Docks and providing that it should determine upon such plans as they deemed wise for the whole waterfront and submit them to the Commissioners of the Sinking Fund, who might adopt or reject any such plan. After the plan was adopted under this act, no wharf, pier or bulkhead, could be constructed except in accordance with the plan. This act went on to authorize the department to acquire for the benefit of the city by the purchase or by condemnation lands not owned by the city. By this act of 1871 the bulkhead line for solid filling was fixed at 150 feet west of 12th Avenue, instead of 100 feet as previously fixed. This bulkhead line was fixed across the land of plaintiff and left submerged lands owned by the plaintiff outside the bulkhead line.

The city, over the protest of the plaintiff, had erected and constructed concrete and steel piers, erected thereon steel sheds, leased them to tenants and the piers had numerous doors and windows which opened onto the water over the Appleby lot so that boats were constantly moored and fastened upon the Appleby property.

The suit was to enjoin the city and its tenants and other defendants from using plaintiff's lots and from dredging them. The Supreme Court and the Court of Appeals of New York held for the defendants. The Supreme Court of the United States reversed the judgment of the New York Courts holding that the deeds were contracts and were absolute deeds of land under

water with the right of the grantee to fill it. The court, on page 1004 of the decision, stated:

> "If we are right in our conclusion as to the effect of these deeds under the law of New York at the time of their execution, then there can be no doubt that the laws of 1357 and 1871 as enforced in this case impair the contract made by the City with the grantees of these deeds."

The Court continued:

> "Our conclusions are that Appleby and Latou were vested with the fee simple title in the lots conveyed, and with a grant of the wharfage at the ends of the lots on the river, that with respect to the water over those lots and the wharfage, the state and the city had parted with the jus publicum and jus privatum and that the city can only be revested with that by a condemnation of the rights granted.
>
> * * * *
>
> "The application of the Acts of 1857 and 1871 by the courts of New York would reduce the rights which were intended to be conveyed in these deeds to practically nothing, *and would leave the grantees only the privilege of paying taxes for something quite unsubstantial.* The qualification of those rights by the order of the Secretary of War still leaves value in the deeds, if the Acts of 1857 and 1871 are invalid, as we would hold them to 'be when applied as they have been in this case'."
> (Page 1007, L.E.)

Admittedly the constitutional prohibition against impairment of the obligation of contract must be construed in harmony with the inherent police power of the state. But interference with constitutional guar-

anties, through a *valid, reasonable* and *not arbitrary* exercise of police power, can be justified only by exceptional circumstances that must indicate their exercise to be in the interest of the general public.

In the instant case there has been no determination that petitioner's lands outside the bulkhead line are necessary for use by the public for the purpose of commerce or navigation or for any other "public use" nor has there been a valid determination that the fixing of this bulkhead line is in the interest of the general welfare. Petitioner has not even been permitted to *plead and prove* that said lands are not needed for such purpose.

The fixing and establishing of a bulkhead line across the property of Petitioner's has destroyed the value of the land, has absolutely ruined the marketability of the lands, and operates as a complete legal restraint on the use of these lands.

If F.S. 253.122 and the action of the Board of County Commissioners of Manatee County, Florida, is upheld then no property rights in this country are safe and secure in the properties of individuals and their rights therein can be taken for the public use merely upon the whim or caprice of a board or bureau by the drawing of a line or passing of a resolution, all without regard to the constitutional rights of the individual property owners involved.

The fixing and establishment of a bulkhead line across the property of Petitioners in this case destroyed the value of Petitioners' lands since there remains absolutely no use to which the land outside the bulkhead line may be put.

In addition to defining navigable waters as all "coastal and intracoastal waters" Section 253.12 provides that when the bulkhead line is fixed or established it represents a line beyond which a further extension creating or filling lands shall be deemed an interference with the servitude in favor of commerce and navigation which means simply that in this case the lands of the Petitioners are being taken without just compensation. No condemnation proceedings have been begun. No right or interest of the public in Petitioners' lands has been shown. No public necessity for the use of Petitioners' lands has been alleged, exhibited or proven.

Certainly this constitutes a "taking" or deprivation of property even though actual ownership of the property has not been transferred from the Petitioner. Petitioner contends that the constitutional prohibition was intended to protect all the essential elements of ownership which made property valuable and petitioner further contends that, although, what is a taking of property within the above stated amendment to the Federal Constitution is not always clear, nevertheless, there is a "taking" when the act involves an actual interference with property rights which results in other than consequential or incidental injuries.

In the instant case the bulkhead line, if allowed, would have the effect of prohibiting the Petitioner from the logical, reasonable use of its land and its vested right to improve and develop same. Thus their property has been taken without just compensation.

Prayer for Writ

WHEREFORE, Your Petitioner prays that a writ of certiorari issue under the Seal of this Court directed to the Supreme Court of the State of Florida commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the said case of:

The Cortez Company vesus Manatee County, et al, so styled upon its docket, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States, and that the judgment herein of the said Supreme Court of the State of Florida be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

By_____

Robert E. Knowles, *Counsel for Petitioner*

APPENDIX

1. Opinion of the Supreme Court of Florida, affirming order of Circuit Court dismissing Petitioner's complaint.

IN THE SUPREME COURT OF FLORIDA, JANPARY TERM, A. D. 1964.

THE CORTEX COMPANY,

Appellant,

vs. CASE NUMBER 32,655.

COUNTY OF MANATEE, et al.,

Appellees.

Opinion filed January 17, 1964.

An Appeal from the Circuit Court for Manatee County, Robert E. Willis, Judge

Robert E. Knowles of Knowles, Knowles and Mann,
for Appellant

James W. Kynes, Attorney General,
Robert C. Parker and James T. Carlisle,
Assistant Attorneys General for Appellees

ROBERTS, J.

This appeal is from an order dismissing an original complaint for declaratory and other relief consequent upon a proceeding by which a bulkhead line was set

pursuant to Section 253,122, F.S., across submerged lands purchased by appellant from the appellee trustees of the Internal Improvement Fund under contract of October 6, 1955.

We find that the controverted order must be affirmed upon authority of *Gies v. Fischer*, Fla. 1962, 146 So. 2d 361. That decision disposed of the *constitutional issues* contrary to apellant's contentions, construing the provision of the statute that such a line "shall represent the line beyond which a further extension . . . shall be deemed an interference with the (public) servitude" as vesting a discretion based on factual determinations, and not arbitrary or capricious in nature.

The power vested in the authorities named in the statutes to fix and determine these lines, must be exercised in the interest of the general welfare and not for the purpose of granting advantage to or imposing penalties upon individual upland owners or others. Nothing in the decision in the Gies case nor this decision is to be construed as depriving the courts, in such cases, of jurisdiction or authority to correct such action where or when it ocurs in an appropriate proceeding.

The record in this cause indicates that the propriety of the *procedural* steps followed by the County and the trustees is not in issue, and appellant's objections to the order below in other respects are without merit.

Affirmed.

DREW, C. J., THORNAL, O'CONNELL and CALDWELL, J. J., concur

2. Order of Supreme Court of Florida denying P :tition for Rehearing:

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A. D. 1964,

Thursday, February 13, 1964.

THE CORTEZ COMPANY,
Appellant

- vs -

COUNTY OF MANATEE, et al.,
Appellees

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT OF MANATEE COUNTY)

3. UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 10, CLAUSE 1.

"No State shall . . . pass any . . . law impairing the obligation of contracts . . .

4. UNITED STATES CONSTITUTION, AMENDMENT 14.

"No person shall be . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

5. SECTION 253.15, FLORIDA STATUTES, 1955.

"In case any island or submerged lands are sold, purchasers shall have the right to bulkhead and fill in same. . . ."

6. SECTION 253.12, FLORIDA STATUTES, 1957.

". . . navigable waters . . . shall include all coastal and intracoastal waters, of the state . . ."

7. SECTION 253.122, FLORIDA STATUTES, 1957.

"Subject to the formal approval of the trustees of the Internal Improvement Trust Fund, the Board of County Commissioners of each county . . . are hereby authorized on their own iniative to locate and fixe abulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable waters of the county as defined in Section 253.12 . . . Any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed."

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4.	Home Building and Loan Association v. Blaisdell 290 U.S. 398, 78 L. Ed. 413, 54 S.Ct. 231	6
5.	New York & New England R.R. Co. v. Town of Bristol, 151 U.S. 556, 38 L. Ed. 269	7
6.	Northwestern Laundry v. Des Moines, 239 U.S. 486, 36 S.Ct. 206, 60 U.S. (L. Ed.) 396	8

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Statutes and Constitutional Provisions

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SUPREME COURT OF THE UNITED STATES

No. 1100

THE CORTEZ COMPANY,
Petitioner,

vs.

COUNTY OF MANATEE, et al.,
Respondent.

Petition for Denial of Writ of Certiorari

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, COUNTY OF MANATEE, [redacted], respectfully prays this Court to deny the Petition of the Petitioner for writ of certiorari.

Reports of the Opinions Delivered by Lower Courts

1. Opinion of the Supreme Court of Florida affirming order of Circuit Court dismissing the Petitioner's complaint, was announced January 17, 1964. Mandate issued February 13, 1964, a copy of said opinion appears in the appendix hereto.

2. Order of the Supreme Court of Florida denying Petition for Rehearing was filed February 13, 1964. A copy of said order appears in the appendix hereto.

Basis of Jurisdiction

Petitioner seeks to have reviewed in his Petition for Certiorari that order entered by the Supreme Court of the State of Florida, in the above entitled cause, dated January 17, 1964, which became final upon a denial of Petitioner's petition for rehearing dated February 13, 1964, and the issuance of the mandate of said court on that date.

The jurisdiction of this court was invoked by the Petitioner under the provisions of the following Statute of the United States: FCA, Title 28, Section 1257(3)

Section 1257(3) supra:

> Final judgments of decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . (3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of

the United States or where any title, right, privilege or immunity, is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Questions Presented for Review

1. Is Section 253.122 of the 1957 Florida Statutes void and unconstitutional in that it impairs the obligations of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

2. Is the decision fixing such a bulkhead line void and unconstitutional in that it impairs the obligation of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

3. Is the decision fixing such a bulkhead void and unconstitutional in that it is a taking of the private property outside the bulkhead line, without just compensation contrary to Amendment XIV of the Constitution of the United States?

Constitutional Provisions and Florida Statutes Involved

1. United States Constitution, Article 1, Section 10, Clause 1-FCA, Constitution, page 205.

2. United States Constitution, Amendment 14, -FCA, Amendments, Page 65.

3. Section 253.122, Florida Statutes, 1957.

4. Section 253.15, Florida Statutes, 1955.

5. Section 253.12, Florida Statutes, 1957.

Summary Statement of the Case

The Respondent adopts the Petitioner's statement of the case and further states that all the procedural steps required by Section 253.122 of the Florida Statutes relating to the fixing of a bulkhead line were followed and that this was not an issue in the lower courts.

Reasons for the Denial of the Petition for Writ of Certiorari

Respondent contends that the setting of a bulkhead line through part of the Petitioner's property was done under Section 253.122 of the 1957 Florida Statute. This section was passed by virtue of the State's police power and therefore the action taken under it by the Board of County Commissioners did not violate Article 1, Section 10 of the United States Constitution.

The Petitioner claims that valid laws subsisting at the time and place of making a contract became a part of this contract. At the time when the executory contract was entered into on October 6, 1955, the State at that time had not yet exercised its police power by establishing a bulkhead line. There is no contention here that the establishment itself of such a bulkhead line is outside the police powers of the State. It has been clearly decided that such matters as zoning, building, etc., are within the police powers of the State. The contracting parties are subject to future exercise of this police power, although at the time the contract is made the State has not yet exercised such power. This principle was stated in Kindelberger v. Lincoln National Bank of Washington, 155 F 2nd 280, in these words:

> "Moreover, persons who contract concerning matters which may be regulated by virtue of the police power of government necessarily enter into their engagements subject to the possible exercise of that power, it may be latent at the time the agreement is made."

Although by Section 253.15 of the Florida Statutes of 1955, the purchaser of submerged lands had the right to bulkhead and fill, this did not become a constitutional right of the Petitioner. In Thornton v. Duffey 254 U.S. 361, 65 L. Ed. 304, 41 S. Ct. 137, the Court stated:

> "To assert that the first steps of a policy made it immuntable is to assert that imperfections and errors in Legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new, and we have heretofore been invoked to pronounce judgment upon it. Complying we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts."

The Petitioner here received from the Trustees of the Internal Improvement Fund a fee simple title to the property in question. There is no claim of a grant of immunity to the corporation from the State from legitimate governmental control. Such a grant must be clearly shown and will never be presumed. In the case of Chicago & Alton R.R. Co. v. Tranbarger 238 U.S. 67, 59 L. Ed. 1204, 35 S. Ct. 678 The Court stated the following:

> "Grants of immunity to a corporation from legitimate governmental controls are never to be presumed. On the contrary, the presumptions are

> all the other way; and unless an exemption is clearly established, the Legislature is free to act upon all subjects within its general jurisdiction as the public interests may seem to require."

The Court went on to state that:

> "The regulation to which a corporation is subject include not only such as conduce to the public health, safety and morals, but also such as promote the public convenience or general prosperity."

The case of Wood v. Lovette cited in Petitioner's brief was such a case where the State granted specific and clear immunities to those who purchased tax titles from the State. Therefore, this case has no application to the case in question.

The control over the navigable waters of the State is an essential attribute of the State's sovereign power. When the parties entered into their executory contracts on October 6, 1955, this attribute of sovereignty was part of this contract. The State at no time gave up under its police power the right to regulate the property in question for the health, safety, morals and welfare. Even though under the law, as existed in 1955, the Petitioner obtained the right to fill this submerged land there remained in the State or its sub-divisions a right to regulate this property for the public welfare. In the case of Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 78 L. Ed. 413, 54 S. Ct. 231, the Court stated:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting

> contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile, a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of State power has had progressive recognition in the decisions of this Court."

It is a well established fact that a ragged, indented shoreline creates pockets in which the water tends to stagnate, breeding disease and accumulating filth, as these pockets are so situated that they are not susceptible of being flushed by the action of the tides and currents. It is therefore essential that the State government regulate the shoreline to preserve the community from injury. In the case of New York & New England R.R. Co. v. Town of Bristol, 151 U.S. 556, 38 L. Ed. 269, it was stated:

> "It is likewise thoroughly established in this Court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by a legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to government regulations in particulars essential to the preservation of the community from injury."

The fact that part of Petitioner's lands have been rendered less useful by the setting of such a bulkhead line does not render such action unconstitutional. The

Board of County Commissioners, a political subdivision of the State, did not appropriate this land for its own use. Their action was purely one of regulation under the police powers for the public welfare. In the case of Northwestern Laundry v. Des Moines 239 U.S. 486, 36 S. Ct. 206, 60 U.S. (L. Ed.) 396, the Court ruled on such a case where this type of legislation acted harshly upon one of the parties. The Court stated in these words:

> "So far as the Federal Constitution is concerned, we have no doubt the State may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require a discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance."

The fact that the contract was between the Petitioner and the State of Florida, does not put the Petitioner in a special position. Such contracts with the State are treated the same as contracts between individuals. In the case of New Orleans Gas Light Company v. Louisiana Light, etc. Mfg. Co., 29 L. Ed. 516, 115 U.S. 671, 6 Sup. Ct. Rep. 263, The Court stated:

> "The constitution prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, as the one or the other may be invalid in the execution of such contracts. Rights and privileges arising in contracts with a State are subject to regulations for the protection of the public

> health, the public morals and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporation."

The Petitioner claims that no condemnation proceedings have been begun, and that no public necessity for the use of his property has been alleged. Petitioner also claims that Respondent's action is a taking of the property even though actual ownership of the property has not been transferred to the Respondent. Such a contention was brought up in the case of Knox v. Lee, 20 L. Ed. 287, 79 U.S. 379 where the Court dealt with this in the following words:

> "Closely allied to the objection we have just been considering, is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the Fifth Amendment which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, *and not to consequential injuries* resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to limit laws that indirectly work harm and loss to individuals."

In the present case there has been no appropriation of Petitioner's property and the sole action has been one under its police powers. The result has been that the Petitioner is prohibited from using parts of his property for the safety of the public. The Case of Sweet v. Rechel, 159 U.S. 380, 40 L. Ed. 188, 16 St. Ct. 43 stated that:

> "Undoubtedly, the State, without taking the title to itself, may, in some appropriate mode, and with-

> out compensation to the owner forbid the use of specified private property where such use would be injurious to the public health. For, as said by Chief Justice Shaw in Com. v. Alger, 7 Cush. 53, 84, 'it is a settled principle growing out of the nature of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having, an equal right to the enjoyment of their property, nor injurious to the rights of the community.' . . ."

The Petitioner in his brief cites the cases of Appleby v. New York, 271 U.S. 365, 70 L. Ed. 92, and contends that this case decided the very question being presented in his brief. The Respondent contends that the facts in our present case are so unlike those of the Appleby case, that the Appleby decision is in no way applicable to the present case. In the Appleby case the City conveyed a fee simple title to the land and in addition covenanted that Appleby and his heirs and assigns should receive all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from the west side of the granted premises. In this same Deed Appleby covenanted with the City that within three months after the City required it he would build four bulkheads and wharves and fill in and pave such parts of 12th and 13th Avenue and 39th and 40th Streets, as lay within the described premises.

Therefore, in the Appleby case the City gave up clearly and specifically any rights to control or use the described property. This is not so in our case where the State of Florida simply granted a fee simple title to the Petitioner, without giving up in any way its future

rights to regulate the property under the police power for the general welfare.

In the Appleby case the law of 1871 authorized the Department of Docks to set forth a plan for the complete development of the waterfront and gave the Department the right to acquire by purchase or by condemnation any wharf property not belonging to the City. Under this a condemnation proceeding was begun by the City against Appleby to appropriate part of his land and during the pendency of this proceeding the City constructed concrete and steel piers against Plaintiff's objection within his property. The Petition was not to nullify the bulkhead line but to enjoin the City and its tenants and the other Defendants from using Plaintiff's lots as a slip or permanent mooring place and from dredging them.

Regarding the question of the contract between the City and Appleby, the Supreme Court stated that this was a State question and that it must be determined from the law of the State as it was when the Deeds were executed. In discussing these State decisions, the Supreme Court stated in the following words:

> "It is apparent from these decisions that under the law of New York, when these cases were decided, whenever the Legislation deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself of its exercise as sovereign of the jus publicum, that is the power to preserve and regulate navigation, it might do so; but that the conclusion that it had thus excluded the jus publicum could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted."

The Court went on to discuss the decision of Langdon v. New York 93 N.Y. 129, and stated the effect of the Langdon decision in these words:

> "The necessary effect of the Langdon case, which has always been a leading authority in the State of New York, is that a grant upon a valuable consideration of the easement of wharfage related to land under water conveyed by the City by authority of the State, for the purpose of promoting commerce in the harbor of the City, takes away from the City and State the power to regulate navigation in any way which would interfere with or obstruct the grant, and that if the City desired in the interest of navigation to obstruct such easement it must acquire it by condemnation."

Therefore, the Court in the Appleby case, because the City had specifically and clearly granted away any rights to the land in question ruled that the laws passed by the State did impair the contract made by the City with the grantees of these deeds. The deed in question in the Appleby case was not one which granted the land in fee simple only but contained various covenants.

The City in the Appleby case did not only attempt to regulate the Plaintiff's property, but appropriated this property for its own use and for its own profit. This is the very type of appropriation which the United States Supreme Court has so often mentioned in previous decisions. This does not exist in the case at hand since the State has not attempted to make any use of Petitioner's property but only to regulate the property for the public health and welfare. The Court in Appleby case stated:

> "Of course we do not intend to say that under such deeds as these, as long as water connected

> with the river remains over the land conveyed and to be filled, navigation may not go on and boats may not ply over it and that incident to such use occasional mooring may not take place. But it is a very different thing to say that the City which has parted with the jus publicum and jus privatum over such water lots remains in unrestricted control of navigation with the right to dredge them or appropriate the water over them as a slip or regular mooring place for its adjoining piers in the doing of a great business largely excluding Plaintiff's and all others from use of the water over those lots for the constant private use of the City's tenants for its profit."

The Court decided only what rights the plaintiff had under its particular deeds and ruled only that by the deeds involved the City had extinguished its use publicum. It did not decide the question as to whether or not the State could regulate the use of an individual's property under its police power for the public welfare.

If the bulkhead line were not upheld in this case it would prevent the State and its subdivisions from regulating under its police powers for the public welfare all lands having been conveyed by the Trustees of the Internal Improvement Fund.

Prayer for Denial of Writ of Certiorari

WHEREFORE, your respondent prays that this Honorable Court deny Petitioner's Petition for a writ of certiorari in that there has been no showing in his brief that there exists any violation of the United States Constitution.

Respectfully submitted

By Kenneth W. Cleary

Kenneth W. Cleary, *Counsel for Respondent*

APPENDIX

1. Opinion of the Supreme Court of Florida, affirming order of Circuit Court dismissing Petitioner's complaint.

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1964.

THE CORTEZ COMPANY,
Appellant,

vs. CASE NUMBER 32,655

COUNTY OF MANATEE, et al.,
Appellees.

Opinion filed January 17, 1964.

An Appeal from the Circuit Court for Manatee County, Robert E. Willis, Judge

Robert E. Knowles of Knowles, Knowles and Mann,
for Appellant

James W. Kynes, Attorney General,
Robert C. Parker and James T. Carlisle,
Assistant Attorneys General for Appellees

ROBERTS, J.

This appeal is from an order dismissing an original complaint for declaratory and other relief consequent upon a proceeding by which a bulkhead line was set

pursuant to Section 253.122, F.S., across submerged lands purchased by appellant from the appellee trustees of the Internal Improvement Fund under contract of October 6, 1955.

We find that the controverted order must be affirmed upon authority of *Gies v. Fischer*, Fla. 1962, 146 So. 2d 361. That decision disposed of the *constitutional issues* contrary to appellant's contentions, construing the provision of the statute that such a line "shall represent the line beyond which a further extension . . . shall be deemed an interference with the (public) servitude" as vesting a discretion based on factual determinations, and not arbitrary or capricious in nature.

The power vested in the authorities named in the statutes to fix and determine these lines, must be exercised in the interest of the general welfare and not for the purpose of granting advantage to or imposing penalties upon individual upland owners or others. Nothing in the decision in the Gies case nor this decision is to be construed as depriving the courts, in such cases, of jurisdiction or authority to correct such action where or when it occurs in an appropriate proceeding.

The record in this cause indicates that the propriety of the *procedural* steps followed by the County and the trustees is not in issue, and appellant's objections to the order below in other respects are without merit.

Affirmed.

DREW, C. J., THORNAL, O'CONNELL and CALDWELL, J. J., concur

2. Order of Supreme Court of Florida denying Petition for Rehearing:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1964,
Thursday, February 13, 1964.

THE CORTEZ COMPANY,
Appellant

- vs -

COUNTY OF MANATEE, et al.,
Appellees

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT OF MANATEE COUNTY)

3. UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 10, CLAUSE 1.

"No State shall . . . pass any . . . law impairing the obligation of contracts . . ."

4. UNITED STATES CONSTITUTION, AMENDMENT 14.

> "No person shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

5. SECTION 253.15, FLORIDA STATUTES, 1955.

> "In case any island or submerged lands are sold, purchasers shall have the right to bulkhead and fill in same . . ."

6. SECTION 253.12, FLORID ASTATUTES, 1957.

> ". . . navigable waters . . . shall include all coastal and intercoastal waters, of the state . . ."

7. SECTION 253.122, FLORIDA STATUTES, 1957.

> Subject to the formal approval of the trustees of the Internal Improvement Trust Fund, the Board of County Commissioners of each county . . . are hereby authorized on their own initiative to locate and fix a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable water of the county as defined in Section 253-12 . . . Any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed."

ARY
COURT. U. S.

Office-Supreme Court, U.S.
FILED
JUN 29 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

1964

No. [redacted] 76

THE CORTEZ COMPANY,

Petitioner

—vs—

MANATEE COUNTY, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES W. KYNES
Attorney General

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Trustees of the Internal
Improvement Fund of the
State of Florida

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IN THE

Supreme Court of The United States

No. 1100

THE CORTEZ COMPANY,

Petitioner,

—vs—

MANATEE COUNTY, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Trustees of the Internal Improvement Fund of the State of Florida, admit that the jurisdiction of the United States Supreme Court is properly invoked by the Petition for Writ of Certiorari under the provisions of Title 28 U.S.C.A., Section 1257 (3). It is solely within the discretion of the Court to determine whether the importance of the case warrants further consideration. Respondents herewith respectfully submit the following memorandum in an effort to assist the Court in making its determination.

REPORTS OF THE OPINIONS DELIVERED BY THE LOWER COURTS

1. Opinion of the Supreme Court of Florida affirming order of Circuit Court dismissing the Petitioner's complaint, was announced January 17, 1964. Mandate issued February 13, 1964, a copy of said opinion appears in the appendix hereto.

2. Order of the Supreme Court of Florida denying Petition for Rehearing was filed February 13, 1964. A copy of said order appears in the appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. IS SECTION 253.122 OF THE 1957 FLORIDA STATUTES VOID AND UNCONSTITUTIONAL IN THAT IT IMPAIRS THE OBLIGATIONS OF A CONTRACT CONTRARY TO ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES?

2. IS THE DECISION FIXING SUCH A BULKHEAD LINE VOID AND UNCONSTITUTIONAL IN THAT IT IMPAIRS THE OBLIGATION OF A CONTRACT CONTRARY TO ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES?

3. IS THE DECISION FIXING SUCH A BULKHEAD LINE VOID AND UNCONSTITUTIONAL IN THAT IT IS A TAKING OF THE PRIVATE PROPERTY OUTSIDE THE BULKHEAD LINE, WITHOUT JUST COMPENSATION, CONTRARY TO AMENDMENT XIV OF THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL PROVISIONS AND FLORIDA STATUTES INVOLVED

1. United States Constitution, Article I, Section 10.
2. United States Constitution Fourteenth Amendment.
3. Section 120.041(1), Florida Statutes, 1964.
4. Section 253.12, Florida Statutes, 1957.
5. Section 253.122, Florida Statutes, 1957.
6. Section 253.15, Florida Statutes, 1957.

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

It is respectfully submitted that Question One, above is not germane. Section 253.122 of the 1957 Florida Statutes, considered apart from any application thereof, is innocuous. Perhaps the statute could be applied in an unconstitutional manner, but standing alone the statute is constitutional on its face. For this reason, and the fact that a consideration of Section 253.122, Florida Statutes, is inherent in a consideration of Question Two, Respondents, Trustees of the Internal Improvement Fund, suggest that Question One be disregarded.

Question Two, above, is relevant. In the light of the above observations with respect to Question One, Respondents would suggest that Question Two be reworded to read as follows:

2. Is the decision made pursuant to Section 253.122, Florida Statutes, fixing such a bulkhead line void and

unconstitutional in that it impairs the obligation of a contract contrary to Article I, Section 10 of the Constitution of the United States?

Respondents have no argument with the form of Question Three above.

RESPONSE ON THE MERITS

The application of Section 253.122, Florida Statutes, to Petitioner's lands does not constitute an impairment of contract. A law which does not strike at the vitality of a contract either by altering its terms or preventing its preservation and enforcement does not impair its obligation. A statute which does not act on the contract itself but merely on the property which is the subject of the contract may not be said to impair the obligation of the contract. 16 A. C.J.S., *Constitutional Law*, Section 353, pp. 23 and 24. In *Curtis v. Whitney*, 13 Wall. 69, 80 U.S. 68 at 70 and 71 (1871); it was held:

". . . Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making of a large class of contracts, that they may be affected in many ways by State and National legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution so long as the obligation of performance remains in force."

In the case at bar, Petitioner had entered into a purchase contract with Respondents, Trustees of the Internal

Improvement Fund, to purchase certain submerged lands in Manatee County, Florida. Under the provisions of Section 253.15, Florida Statutes of 1955, Petitioner had the right to bulkhead and fill said submerged lands. In 1957 the Florida Legislature passed Section 253.122, Florida Statutes, authorizing the Boards of County Commissioners to set bulkhead lines subject to the formal approval of the Trustees of the Internal Improvement Fund. In 1959, the Board of County Commissioners established the disputed bulkhead line.

Petitioner's contract with the Trustees of the Internal Improvement Fund after the setting of the bulkhead line was nevertheless in full force and effect. There was no lessening of the means provided by law for the enforcement of the contract. Consequently, there was no impairment of contract.

Assuming, solely for purposes of argument, that there had been an impairment of the obligation of contract, the decision of the Florida Supreme Court was nevertheless correct. Legislation which is enacted in a proper exercise of the police power is not an unconstitutional impairment of the obligation of contract. 16 A. C.J.S., *Constitutional Law*, Section 353, p. 24.

In *Manigault v. Springs*, 199 U.S. 473, Plaintiff and Defendant entered into contract whereby it was agreed that Defendant should remove obstructions to a navigable creek so as to give Plaintiff a clear passage through the

creek. The General Assembly of the State of South Carolina passed an act giving the Defendants, by name, the authority to erect and maintain a dam across said creek. Against the contention that said act was an impairment of the obligation of contract, it was held that:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into by the individuals may therefore be affected. This power, whic! in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts by the individuals."

See also *Cities Service Gas Co. v. Peerless*, 340 U. S. 179; *Smith v. Hoboken Railroad, Warehouse & Steamship Connecting Co.*, 328 U. S. 123; *East New York Savings Bank v. Hahn*, 326 U. S. 230; *Faitoute Iron & Steel Co. v. City of Asbury Park*, 216 U. S. 502; *Phillips Petroleum Co. v. Cabot*, 210 F. 2d 841, United States Court of Appeals, 10th Circuit, 1954 vacated and remanded on other grounds, 343 U. S. 390.

Section 253.122, Florida Statutes, is an exercise of the police power. See *Zabel v. Pinellas County Water and Navigation Control Authority*, (Fla.) 154 So. 2d 181 (1963). In further support of this proposition, the court's attention is directed to Rule 200-2.02 of the Rules of the

Trustees of the Internal Improvement Fund. Said rule was promulgated under the authority of Section 253.122, Florida Statutes, and filed with the Secretary of State of the State of Florida in accordance with Section 120.041 (1), Florida Statutes. Section 200-2.02, is as follows:

Bulkhead line criteria.--Criteria for evaluation of the locations for bulkhead lines shall include the possible consequential effects of sales and filling submerged lands upon

(1) Free use of public waters for navigation, transportation and public recreation.

(2) Conservation of marine life, wildlife and other natural resources.

(3) Erosion of uplands, shoaling of channels, accretion, tidal currents, flow of water, storm tides and hurricane damage.

(4) Upland property values and the economy of the zone.

(5) Natural beauty and recreational advantages of the area.

(6) Public beaches, Atlantic Ocean frontages for which bulkhead lines will not be approved, and public rights of way in which no bulkhead lines will be approved.

(7) Problems of the area including need of improvement of shore lines, elimination of stagnant pockets, availability of fill material, effects of dredging

beyond the bulkhead line to obtain fill material, preservation of fresh water drainage into the public waters, equitable divisions of submerged lands for allocation and sale to riparian owners, particularly in coves, the effect of anticipated scattered sales and filled extensions in the general area pending sales and filling to the bulkhead line by all waterfront owners."

Therefore, even if the obligation of contract had been impaired, no constitutionally prohibited impairment took place under the application of Section 253.122, Florida Statutes, to Petitioner's lands because said application was a valid exercise of the police power of the state.

Petitioner's third question for review may be answered by the words of Mr. Justice Douglass in *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80 at 83, (1946):

"Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. *Reinman v. Little Rock*, 237 U. S. 171, 59 L. ed 900, 35 S. Ct. 511; *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. ed 348, 36 S. Ct. 143, Ann Cas 1917B 927; *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 63 L. ed 381, 39 S. Ct. 172; . . . In no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. *Hadacheck v. Sebastian*, supra (239 U. S. p. 410, 60

L. ed 356, 36 S. Ct. 143, Ann Cas 1917 B 927). And see *Chicago B & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed 948, 18 S. Ct. 513; *Hutchinson v. Valdosta*, 227 U. S. 303, 57 L. ed 520, 33 S. Ct. 290. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. *Block v. Hirsh*, 256 U. S. 135, 155, 65 L. ed 865, 870, 41 S. Ct. 458, 16 A. L. R. 165."

The Florida courts have sustained the application of Section 253.122, Florida Statutes, to Petitioner's lands on two grounds. The first of these, the police power, has been amply discussed. The second of these grounds has come to be known as the inalienable trust doctrine. The doctrine was enunciated by the United States Supreme Court in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387 (1892). The Florida Supreme Court adopted this doctrine in *State ex rel. Ellis v. Gerbing*, 47 So. 353 at 355 (1908):

"The trust with which these lands are held by the state is governmental, and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may by appropriate means grant to individuals the title to limited portions of the lands, or give limited privileges therein, but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the land and waters."

The court in *Ellis v. Gerbing*, supra, also said:

"A state may make limited disposition of portions of such lands, or the use thereof, in the interest of the public welfare, where the rights of the whole people of the State as to navigation and other uses of the waters are not materially impaired. The States cannot abdicate general control over such lands and the waters thereon since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good."

A similar application of Section 253.122, Florida Statutes, was upheld as an exercise of the police power or as an exercise of the retained power under the trust doctrine governing sovereign lands in *Gies v. Fischer*, (Fla.) 146 So. 2d 361 at 363 (1962). Therefore, the application of Section 253.122 to Petitioner's lands may be upheld as an application of the inalienable trust doctrine.

Consideration of the record will establish that Petitioner has never contested the reasonableness of locating a bulkhead line on his property. He has confined his argument to the validity of the statute. Consequently, he should not be permitted to argue that the application is unreasonable.

Petitioner relies heavily on *Wood v. Lovett*, 313 U. S. 362 (1941). In that case the appellant purchased land from the State of Arkansas. The state had acquired the land from the appellee for nonpayment of taxes. An Arkansas statute in effect at the time of appellant's purchase protected the appellant from having his deed set aside on certain grounds which were named in the statute. The statute was repealed and appellee had the deed set aside on one of the named grounds. The U. S. Supreme Court held that the repeal was an unconstitutional impairment of contract.

The Arkansas action must be viewed in the setting of the statutory scheme of taxation, sale of forfeited lands to the state, and sale in turn by the state. Its purpose was to assure one willing to purchase from the state a title immune from attack on grounds theretofore available. By its legislation the State said, in effect, to the prospective purchaser of lands acquired by deliquent taxes, that if he would purchase he would have the immunity. The immunity was necessary in order to induce persons to purchase lands under tax deeds and thus return them to the tax rolls. The right to fill was neither an inducement to purchase nor a part of the obligation of the contract. Incumbent upon the State of Arkansas was the duty, arising from its contracts with purchasers to protect their titles from attack. The State of Florida had no duty to purchasers of submerged lands to permit promiscuous unrestrained filling of such lands. On the contrary, the State's duty to its citizens was to regulate such activity. An analogy at this time is obvious. Were the State to sell lands within a municipality with the knowledge that the purchaser intended to construct a building fronting on

the sidewalk, the city would not thereby be precluded from establishing a reasonable building set-back line prohibiting such construction. Nor is the County of Manatee precluded from setting a bulkhead line simply because the state sold the lands with the knowledge that Petitioner intended to fill them.

Assuming, solely for purposes of argument, that the preservation of the right to bulkhead and fill was a part of the State's obligation under the contract, then the power and duty of the State with respect to sovereignty lands is also a part of the contract.

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398. Also see Mr. Justice Black's dissent in *Wood v. Lovett*, supra; and see *Meyer v. City of Eufaula, Oklahoma*, 154 F. 2d 943 at 945, Circuit Court of Appeals, Tenth Circuit (1946).

Under the state's sovereign power to regulate on behalf of the health, welfare and safety of its citizens as well as its duty to so regulate under the trust with which submerged lands under navigable waters are inalienably impressed, the State of Florida may regulate the extent of the fill on Petitioner's land.

Petitioner also relies heavily on *Appleby v. New York*, 271 U. S. 365. In the Appleby case, the City of New York maintained a condition on its property which fostered the mooring of boats on Appleby's property. Consequently,

a suit was brought to enjoin the City from using and dredging Appleby's lots. Neither the State of Florida nor the County of Manatee are using Petitioner's property. He is merely prohibited from filling his property past the bulkhead line. Respondent, the County of Manatee, has set forth in its Petition for Denial such other substantial distinguishing facts as to show that the Appleby case is totally inapplicable to the case at bar.

CONCLUSION

The application of Section 253.122, Florida Statutes, to Petitioner's lands may be sustained on the grounds that no impairment of contract took place, that it is a legitimate exercise of the police power of the State, that it was not an unconstitutional taking without due process, and as valid application of the inalienable trust doctrine.

Respectfully submitted,

JAMES W. KYNES
Attorney General

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Assistant Attorney General

JAMES T. CARLISLE
Assistant Attorney General

Counsel for Respondents,
Trustees of the Internal
Improvement Fund of the
State of Florida

APPENDIX

1. Opinion of the Supreme Court of Florida, affirming order of Circuit Court dismissing Petitioner's complaint.

IN THE SUPREME COURT OF FLORIDA,

JANUARY TERM, A. D. 1964.

THE CORTEZ COMPANY,

Appellant,
Case Number 32,655

vs.

COUNTY OF MANATEE, et al.,

Appellees.

Opinion filed January 17, 1964.

An Appeal from the Circuit Court for Manatee County, Robert E. Willis, Judge

Robert E. Knowles of Knowles, Knowles and Mann, for Appellant

James W. Kynes, Attorney General, Robert C. Parker and James T. Carlisle, Assistant Attorneys General for Appellees

ROBERTS, J.

This appeal is from an order dismissing an original complaint for declaratory and other relief consequent upon a proceeding by which a bulkhead line was set pursuant to Section 253.122, Florida Statutes, across submerged

lands purchased by appellant from the appellee Trustees of the Internal Improvement Fund under contract of October 6, 1955.

We find that the controverted order must be affirmed upon authority of *Gies v. Fischer*, Fla. 1962, 146 So. 2d 361. That decision disposed of the *constitutional issues* contrary to appellant's contentions, construing the provisions of the statute that such a line "shall represent the line beyond which a further extension . . . shall be deemed an interference with the (public) servitude" as vesting a discretion based on factual determinations, and not arbitrary or capricious in nature.

The power vested in the authorities named in the statutes to fix and determine these lines, must be exercised in the interest of the general welfare and not for the purpose of granting advantage to or imposing penalties upon individual upland owners or others. Nothing in the decision in the Gies case nor this decision is to be construed as depriving the courts, in such cases, of jurisdiction or authority to correct such action where or when it occurs in an appropriate proceeding.

The record in this cause indicates that the propriety of the *procedural* steps followed by the County and the Trustees is not in issue, and appellant's objections to the order below in other respects are without merit.

Affirmed.

DREW, C. J., THORNAL, O'CONNELL and CALDWELL, J. J., concur

2. Order of Supreme Court of Florida denying Petition for Rehearing:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1964,
Thursday, February 13, 1964.

THE CORTEZ COMPANY,

Appellant,

—vs—

COUNTY OF MANATEE, et al.,

Appellees.

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY

TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT OF MANATEE COUNTY)

3. UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10, CLAUSE 1.

"No State shall . . . pass any . . . law impairing the obligation of contracts. . ."

4. UNITED STATES CONSTITUTION, AMENDMENT 14.

"No person shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

5. SECTION 120.041(1), FLORIDA STATUTES, 1964.

"Each agency shall file with the secretary of state a certified copy of each rule adopted by it."

6. SECTION 253.15, FLORIDA STATUTES, 1955.

"In case any island or submerged lands are sold, purchasers shall have the right to bulkhead and fill in same."

7. SECTION 253.12, FLORIDA STATUTES, 1957.

". . . navigable waters . . . shall include all coastal and intercostal waters, of the state. . ."

8. SECTION 253.122, FLORIDA STATUTES, 1957.

Subject to the formal approval of the Trustees of the Internal Improvement Trust Fund, the Board of County Commissioners of each county . . . are hereby authorized on their own initiative to locate and fix a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable water of the county as defined in Section 253.12 . . . Any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be

deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of the state are inalienably impressed."

9. SECTION 200-2.02 OF THE RULES OF THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND.

Said rule is set out on pages 7 and 8 of the text of this Response to Petition for Writ of Certiorari.